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Supreme Court, U.S.
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No. 93-1794

In The

Supreme Court of the United States

October Term, 1993

UNION TANK CAR COMPANY,

Petitioner,

v.

VARIOUS PLAINTIFFS IN CLASS,

Respondents.

(In re: Miamisburg Train Derailment Litigation)

On Petition For Writ Of Certiorari To The Supreme Court Of Ohio

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner has presented the follow questions:

1) The Secretary's regulation requiring brake pads after 1971 would "cover the same subject matter" of Plaintiffs' claims, while at the same time inconsistently holding that the regulation providing that cars predating the 1971 regulation "may continue in use" does not "cover the same subject matter" of, and does not substantially subsume the subject matter of, Plaintiffs' claims;

2) The mere general provision of the "may continue in use" regulation is not equivalent to an affirmative specific statement that such pre-1971 tank cars would be shielded from liability under state tort law which, according to the Ohio Court, is necessary to effect preemption;

3) Although the regulation in question would likely preempt any state law or regulation on the subject, it is insufficient to preempt state common law claims under FRSA §434?

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JURISDICTION

Respondent does not take issue with the Petitioner invoking in the jurisdiction of this Court under 28 U.S.C. §1257.

STATUTORY PROVISION INVOLVED

In addition to the statutes and regulations restated in the Petition for Writ of Certiorari 45 U.S.C. §421 provides:

§421. Congressional declaration of purpose

The Congress declares that the purpose of this chapter is to promote safety in all areas of railroad operations and to reduce railroad-related accidents, and to reduce deaths and injuries to persons and to reduce damage to property caused by accidents involving any carrier of hazardous materials.

STATEMENT OF THE CASE

Respondent takes issue with the facts recited in the statement of the case provided by the Petitioner. Respondent notes that the following facts should be considered when this Court decides whether to grant the Petition for Writ of Certiorari.

The evidence in this case established that the major reason for the release of the toxic cloud was the fact that the tank car, UTLX 79499, lacked a reinforcing pad where the bottom brake attachment was connected to the shell of the tank car. In 1971, federal regulations required all new tank cars to contain a reinforcing pad. 49 C.F.R. §179.200-19(b). The purpose of the reinforcing pad was to provide protection if the tank car derailed. In the event of derailment, the brake attachment would shear in such a manner as to protect integrity of the tank shell without causing a rupture.

Although the Secretary of Transportation promulgated 49 C.F.R. §179.1(c), providing the owners of tank cars with the option to continue to use existing tank cars that did not comply with new regulations, Section

179.1(c) related to a series of regulations regarding tank car construction. Section 179.1(c) unlike the apparent characterization of the Petitioner, was not drafted with reinforcing pads in mind. Section 179.1(c) in fact, did not refer to reinforcing pads or impose any standard of national uniformity on the owners of tank cars with regard to reinforcing pads.

In this case, the Respondent Class Plaintiffs are not seeking to require the Petitioner to exceed accepted federal standards, but merely to comply with the standard in existence on July 8, 1986. *See* 49 C.F.R. Section 179.200-19(b). Consistent with the federal regulations, the Petitioner had three courses of action that it could have taken regarding the use of UTLX 79499, the tank car that ruptured and emitted a toxic cloud of phosphorous on July 8, 1986. Prior to the accident, the Petitioner could have removed the tank car from dangerous hazardous chemical service when the Petitioner learned that federal regulations required tank cars manufactured after 1971 to contain a reinforcing pad designed to prevent the release of toxic chemicals in the event of a derailment. The Petitioner could have retrofitted UTLX 79499 with a reinforcing pad during the twenty (20) year period that the tank car was on the tracks prior to the accident so that it complied with the existing federal standard. The last option available to the Petitioner was to do nothing and let UTLX 79499 remain on the tracks despite knowing that the tank car lacked a reinforcing pad that the Department of Transportation had determined would reduce the incidents of chemical loss that occurs during a

derailment. By choosing the third option, the Petitioner subjected itself to common law tort liability.

REASONS FOR DENYING THE WRIT

Respondent Class Plaintiffs respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the decision of the Ohio Supreme Court. Contrary to the Petitioner's arguments, the Ohio Supreme Court's decision is consistent with established principles of preemption analysis. When the Ohio Supreme Court reversed the Court of Appeals, it properly applied the decision of this Court in *CSX Transp. Corp. v. Easterwood*, 507 U.S. ___, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1993).

The decision of the Ohio Supreme Court does not, as the Petitioner suggests, subject the Petitioner to arbitrary common law tort claims. The claims of the Respondent Class Plaintiffs are based on the Petitioner's failure to meet regulations ordered by the Secretary of Transportation. In this case, the facts establish that the release of the toxic cloud that precipitated the filing of the class action complaint was the direct result of the Petitioner's conscious decision to utilize an outdated system for attaching brake support equipment to a tank shell. Despite the Petitioner's pleas to the contrary, the Secretary of Transportation when he promulgated 49 C.F.R. 179.1(c) did not require nor endorse the Petitioner's previous practice of attaching brake equipment to the tank without a reinforcing pad. In fact, the Secretary of Transportation required the use of reinforcing pads on newly constructed tank

cars because the reinforcing pad would prevent ruptures and the release of toxic chemicals.

The decision of the Ohio Supreme Court will not cripple the rail industry. Instead, the decision serves to enhance the goals and objectives of the Federal Railroad Safety Act (FRSA) by promoting public safety. In addition, the decision does not require the Petitioner nor anyone else affected by regulations promulgated by the Secretary of Transportation to adjust their conduct. The decision of the Ohio Supreme Court establishes that the Secretary of Transportation may not usurp traditional police powers of the state by promulgating a broad and non-specific regulation that suggests that the Petitioner and other railroad entities may continue to use a tank car that fails to satisfy safety regulations required of newly constructed tank cars.

I. THE SUPREME COURT OF OHIO PROPERLY DETERMINED THAT 49 C.F.R. §179.1(c) DID NOT "COVE[R] THE SUBJECT MATTER"

The Ohio Court observed in its opinion that this Court in *CSX Transp. Corp. v. Easterwood*, 507 U.S. ___, 113 S.Ct. 1732, 1737, 123 L. Ed.2d 387, 396 (1993) held that there is a presumption against preemption. The Ohio Supreme Court reached its holding by applying *Easterwood* when it analyzed 49 C.F.R. §179.1(c), the regulation that the Petitioner relied upon to escape tort liability. After analyzing the regulation, the Court held that the Petitioner failed to meet its burden to establish that the words "may continue in use" demonstrates the required

intent to cover the subject matter. Ohio Supreme Court opinion, Appendix to Petition A16.

The claims of the plaintiff class are very specific and relate directly to the use of reinforcing pads in connection with the attachment of the brake support to the tank shell. The regulation, 49 C.F.R. §179.1(c), on the other hand, relates to a broad spectrum of tank car specifications. The regulation does not address the application of 49 C.F.R. §179.200-19(b) and its relationship with brake attachments. More importantly, 49 C.F.R. §179.1(c) does not address nor does it evidence any intent to prevent states from exercising their traditional police powers. Certainly, the Secretary of Transportation could have drafted 49 C.F.R. § 179.1(c) with sufficient specificity that established that he intended the owners and manufactures of existing tank cars to be immune from common law tort liability if a finder of fact determined that a tank car built prior to 1971 was unsafe.

This Court, in fact, held in *Easterwood* that Section 434 of the FRSA imposed a stringent standard for preemption when the Secretary promulgated a regulation pursuant to the FRSA. According to this Court, " . . . given that the regulations provide no affirmative indication of the effect on negligence law, we are not prepared to find preemption solely on the strength of . . . general mandates . . . ". *Easterwood*, 507 U.S. at ___, 113 S.Ct. at 1739-1740, 123 L.Ed.2d at 399.

The fact that 49 C.F.R. § 179.1(c) does not "cover the subject matter" is established when it is compared with 49 C.F.R. § 179.200-19(b). In 49 C.F.R. § 179.200-19(b), the

regulation requiring the use of reinforcing pads, the Secretary of Transportation selected language making the use of reinforcing pads mandatory and prescribed national uniform specifications. The Secretary of Transportation, for example, stated that, "reinforcing pads must be used between external brackets . . . " In addition, 49 C.F.R. § 179.200-19(b) states that "[W]hen reinforcing pads are used, they must not be less than 1/4 inch in thickness . . . ". Finally, 49 C.F.R. § 179.200-19(b), states that "the ultimate sheer strength of the bracket to reinforcing pad weld must not exceed 85% of the ultimate sheer strength . . . ".

The Secretary of Transportation, on the other hand, failed to select words requiring mandatory conduct when he drafted 49 C.F.R. § 179.200-19(b). Section 179.1(c) contains the words "may continue in use". By selecting words that permit subjective behavior, the Secretary of Transportation established that national uniformity was not an important objective. Thus, 49 C.F.R. § 179.1(c) did not cover the subject matter.

Although the Respondents recognize that § 179.1(c) may touch upon or relate to the subject matter of the claims of the class plaintiffs, the precise wording of the regulations together with the obvious fact that the Secretary of Transportation did not believe that national uniformity was required, establishes that the Petitioner has failed to establish that the regulation "substantially subsume[s]" the subject matter. Section 179.1(c), therefore, does not cover the subject matter of the common law tort claims of the class plaintiffs, and it cannot preempt those claims.

II. THE OHIO SUPREME COURT PROPERLY REQUIRED THE PETITIONER TO ESTABLISH THAT 49 C.F.R. § 179.1(c) EXEMPTED AN OWNER AND OPERATOR OF A TANK CAR FROM TORT LIABILITY WHEN THE OWNER AND OPERATOR CHOSE TO CONTINUE TO USE A TANK CAR LACKING REINFORCING PADS

The Ohio Supreme Court when it determined that § 179.1(c) did not preempt the claims of the class plaintiffs emphasized that the Secretary of Transportation, when he drafted 49 C.F.R. § 179.1(c), failed to use language that immunized an owner or operator of a pre-1971 tank car form state tort liability. By choosing the word "may" and providing owners and operators of tank cars options as to how to act, the Secretary of Transportation evidenced his intent that tank car owners and operators could be subject to common law tort liability. The use of non mandatory language by the Secretary of Transportation demonstrates that the Secretary did not intend 49 C.F.R. § 179.1(c) to cover the subject matter and thus to pre-empt State tort laws.

This Court, in *Easterwood,* established that a statute or a regulation must have precise wording before a Court may find that the Statute or regulation preempts common law claims. In *Easterwood,* this Court sought an explicit indication that federal regulations required pre-emption before the Court would find that the claims involving warning devices were preempted. *CSX Transp. Corp. v. Easterwood,* 507 U.S. ___, 113 S.Ct. 1732, 1739, 123 L. Ed. 2d 387, 399 (1993). By requiring a precise indication that a regulation was intended to preempt common law tort claims, this Court affirmatively required a party seeking

to pre-empt common law tort claims to find regulatory or statutory language that demonstrates an intent to cover the subject matter or to substantially subsume the subject matter. In this case, the Petitioner cannot find, because it does not exist, language that would support the belief of the Petitioner that 49 C.F.R. § 179.1(c) preempts the claims of class plaintiffs.

III. THE SUPREME COURT OF OHIO PROPERLY DETERMINED THAT THE IMPOSITION OF COMMON LAW LIABILITY COMPLIMENTED THE FRSA BY ENCOURAGING SAFETY

The fundamental purpose of the FRSA is to promote the safe transportation of dangerous materials by rail. *See* 45 U.S.C. § 421. The Petitioner does not dispute that Congress, when it enacted the FRSA, intended to protect citizens against the type of injuries that arose as a result of the derailment and subsequent puncture of UTLX 79499 on July 8, 1986 in Miamisburg, Ohio. Instead, the Petitioner seeks to use the FRSA as a basis for escaping liability when it unsafely transported hazardous chemicals.

When this Court examines the specific language of the FRSA together with the fundamental purpose of FRSA, this Court will come to the ultimate conclusion that the imposition of common law liability with regard to the specific facts of this case compliments the federal regulation. Similar to the regulation regarding warning devices in *Easterwood*, 49 C.F.R. § 179.1(c) involves a regulatory scheme that does not prescribe the precise conduct that a tank car owner or operator must follow.

Absent specific language requiring uniformity, this Court in *Easterwood* established that the imposition of negligence liability could compliment regulations by promoting safety. *Easterwood, supra,* 507 U.S. at ___, 113 S.Ct. at 1739, 123 L.Ed.2d at 399.

The issue regarding preemption in this case is not whether the Petitioner will be assured of freedom from liability, but whether there is an irreconcilable conflict between the imposition of common law liability and 49 C.F.R. § 179.1(c). The determination of this issue should turn on whether it is impossible for the Petitioner to comply with both the federal regulations and those standards implicitly reflected in state common law. In this case, it is clear that the Petitioner easily can comply with the regulation and pay damages. The Petitioner was free to retrofit UTLX 79499 so that it complied with the manufacturing standards contained in 49 C.F.R. § 179.200-19(b). The class plaintiffs are not seeking to prevent the Petitioner from using a tank car that complies with 49 C.F.R. Section 179.1(c). The class plaintiffs merely are asking a trier of fact to determine whether the conduct of the petitioner was sufficient to justify the imposition of liability. The imposition of state tort liability under these circumstances is imposed as a "compliment" to federal regulations. *See Silkwood v. Kerr-McGee Corporation,* 464 U.S. 238, 256, 104 S.Ct. 615, 626, 78 L.Ed.2d 443, 455 (1984).

CONCLUSION

The decision of the Ohio Supreme Court is consistent with established principles of preemption. This case, moreover, involves a very narrow issue concerning the application of federal regulations in connection with the use of reinforcing pads and the attachment of brake supports to tank cars. The opinion of the Ohio Supreme Court further is supported by the statement of congressional intent when Congress enacted the FRSA. The Petition for Writ of Certiorari, therefore, should be denied.

Respectfully submitted,

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